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Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DIANE HERCEG and ANDY VINES,
Petitioners

v.

HUSTLER MAGAZINE, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the article "Orgasm of Death" constitute an incitement to lawless conduct which was not protected by the First Amendment?

2. Is the test of incitement set forth in *Brandenburg v. Ohio,* and its progeny the correct test in a civil action for wrongful death resulting from non-political speech?

LIST OF PARTIES

The caption on the front cover of this Petition contains a complete list of the parties.

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OPINIONS BELOW

1. This District Court issued four opinions in the course of this litigation. The opinion granting Respondent's Rule 12 Motion, but granting Petitioner leave to amend is published at 565 F. Supp. 802. The opinion denying Respondent's renewed Rule 12 Motion is published at 583 F. Supp. 1566. The opinion granting Respondent's Motion for Summary Judgment, in part, and denying it, in part, is unpublished and is reproduced as Appendix B-1. The opinion denying Respondent's Motions for Judgment Not Withstanding the Verdict and for a New Trial is unpublished and is reproduced as Appendix B-2.

2. The opinion of the Court of Appeals is published at 814 F.2d 1017 and is reproduced as Appendix A.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Court of Appeals was issued on April 20, 1987. No Motion for Rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

(i) Grounds of Jurisdiction:

The District Court had jurisdiction of this case on the grounds of diversity of citizenship.

(ii) Statement of Facts:

The August 1981 issue of Hustler Magazine included an article entitled "Orgasm of Death." (PX-1A). The contents of the article included a detailed description of a sexual practice known as "autoerotic asphyxiation"—hanging oneself while masturbating. (*Id.*) The article contained a number of warnings of dangers associated with the practice, but, interspersed with the warnings were glowing descriptions of the "exhilarations" achieved by those who engage in the practice. (*Id.*).

The record demonstrates that Hustler knew that its magazine was read by minors. (IV-12). By some means not disclosed in the record a copy of the August 1981

issue fell into the hands of Troy Daniel Dunaway, the fourteen-year-old son of Diane Herceg. (III-40). A psychiatrist called by the Plaintiffs described Troy as a normal fourteen-year-old boy. (IV-121). Troy read the article, was attracted by the exhilaration, and, as children are prone to do, ignored the warnings. (III-39). He decided to attempt the practice described in the article.

Early on the morning of August 7, 1981, Troy's brother, Tyler, and Troy's closest friend, Andy Vines, arrived at the Herceg residence. (III-26). Tyler had spent the night at Andy's house. (*Id.*). The boys intended to go swimming and wished to invite Troy. (*Id.*). Troy's mother, however, told them that Troy had worked late that night before and asked the boys not to wake him. (*Id.*).

At 11:00 a.m. Troy had still not awakened, and Andy and Tyler became concerned. (III-38). They knocked on Troy's bedroom door, but the door was locked, and he did not answer. (*Id.*). Tyler then called his mother, Diane Herceg. (III-39). She suggested to Tyler that Troy was simply playing a game with him. (III-26). Tyler then went outside and looked through the window into Troy's bedroom. (IV-104). He saw nothing. (*Id.*).

Andy also looked through the window. (III-39). At first, he saw nothing. (*Id.*). However, as he was removing his head from the window, he happened to glance in the direction of the closet. (III-40). He quickly climbed through the window. (*Id.*). Inside he found Troy's nude body hanging by its neck in the closet. (*Id.*). At Troy's feet was the August 1981 issue of Hustler magazine. (*Id.*). The magazine was open to the article "Orgasm of Death." (*Id.*).

The Plaintiffs called two expert witnesses to testify concerning the characteristics of the article. Bob Rogers, former head of the Department of Journalism at Texas A. & M. University, found the warnings in the article to be contradicted by the larger editorial note describing the purposes of the article. (IV-40). He testified that the warnings were "rendered a sham" by the larger editor's note. (IV-50). He further testified that the article could quite easily incite a fourteen-year-old or younger child to attempt the practice described therein. (*Id.*).

Dr. Seth Silverman, a licensed psychiatrist, testified that, although there was no language in the article explicitly urging the reader to engage in the practice, such urging was implicit in the article. (IV-138). The article "does incite and it provokes and it stimulates an immediate action to reenact this particular event." (IV-139). The witness himself found the article "stimulating," became "curious to know how the whole thing was set up," and found it "incredibly frightening" that he would react this way. (IV-150-1). Adolescence is a time of risk taking, and a typical adolescent would find even the warnings provocative. (IV-151). They tend to heighten the stimulation. (IV-152).[1] Many parts of the article imply that "you can get away with it—if you're good at it." (*Id.*; IV-157). The references to the "overpowering feeling of pleasure" supposedly achieved by those who engage in the practice and similar references "tend to increase in intensity and frequency towards the end of the article."

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1. *Cf., Preliminary Draft Report of the President's Commission On Obscenity and Pornography* (hereinafter "President's Commission"), Vol. I, Chpt. 5, p. 113 (1986): "None of us has the least doubt that sexual violence is harmful, and that general acceptance of the view that "no" means "yes" is a consequence of the most serious proportions."

(IV-159). The witness concluded, based on reasonable medical probability, that the article caused Troy to commit the act which resulted in his death. (IV-148).[2]

The case was submitted to the jury on special interrogatories embracing the interpretation urged by Respondent of this Court's *Brandenburg* opinion. The jury found that the article "Orgasm of Death," had incited the deceased to commit the act which caused his death. The District Court overruled Respondent's Motions for Judgment N.O.V. and for a New Trial and entered judgment on the jury verdict. (Appendix B-2, p. 42a).

The United States Court of Appeals for the Fifth Circuit reversed. The Court first recognized that the jurors apparently believed based upon sufficient evidence that the deceased "had read the article immediately before he entered in the acts that proved fatal and that his reaction to the article was not the result of any clinical psychological abnormality." 814 F.2d at 1021. However, the Court, citing *Bose Corporation v. Consumers Union* felt constrained to conduct an independent review of "the jury's mixed finding of fact and law that the article culpably incited [the deceased's] behavior." 814 F.2d at 1021. The Court then construed this Court's *Brandenburg* opinion as requiring proof that: (1) the practice described in the article is "a lawless act;" (2) that the article "advocated this act;" (3) that the article went "beyond 'mere advocacy' and amounted to incitement;" and (4) that the "incitement was directed to

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2. *Cf., President's Commission, supra,* Vol. I, Chpt. 5, p. 109: "[W]e have reached the conclusion, unanimously and confidently, that the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence."

imminent action." 814 F.2d at 1022. The Court, however, emphasized that the fourth element is most important: "The crucial element to lowering the First Amendment shield is the imminence of the threatened evil." 814 F.2d at 1022.

The Court then focused exclusively on the text of the article, emphasized the warnings contained in the article, ignored the numerous descriptions in the article of the intense physical pleasure which can supposedly be achieved through the practice, and concluded that "no fair reading of [the article] can make its contents advocacy, let alone incitement to engage in the practice." 814 F.2d at 1023. Curiously, although recognizing that the jury was "entitled to consider" the evidence showing that the deceased performed the fatal act immediately after reading the article, the psychiatric testimony about the likely effect of such an article, and the probable state of mind of the deceased, the Court made no attempt to analyze this evidence. Equally curiously, the Court restricted its discussion to the text of the article and made no mention of the extremely provocative photograph of several nude women apparently engaged in the practice that was centered in the first page of the article.

REASONS THE WRIT SHOULD BE GRANTED

A. The Court of Appeals Misconstrued *Brandenburg*:

The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court. With the exception of the line of cases relating to libel actions, this Court has written almost nothing concerning the extent to which the First

Amendment provides a shield against tort liability for damages caused by speech. Nevertheless, tort litigation for damages caused by speech has become increasingly common.[3] This case provides an opportunity for this Court to begin providing guidance to the lower courts for striking the balance between First Amendment values and the equally important value of providing a seriously injured party with a remedy against the person whose conduct caused the injury.

Petitioners' theory of the case at trial was that Hustler stimulated, enticed, or "incited" the deceased to engage in exceedingly dangerous conduct which was likely to result in and did, in fact, result in his death. The jury believed Petitioner's theory of the case, and the Court of Appeals found the evidence sufficient to support the facts (as opposed to mixed findings of fact and law) found by the jury. 814 F.2d at 1021. The Court of Appeals further implicitly assumed that Petitioner's theory constituted a viable ground for recovery under State law. Nevertheless, the Court of Appeals conducted an independent review of the record and held that tort liability under these circumstances could not withstand First Amendment scrutiny.

The Court of Appeals accepted Hustler's contention that *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827,

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3. *See, e.g.,* Weirum v. RKO General, Inc., 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975); Walt Disney Productions, Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. App. 1982), *cert. denied,* 459 U.S. 1226 (1983); DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982); Hilker, "Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis," 52 S. Cal. L. Rev. 529 (1979); *Annotation,* "Liability for Personal Injury or Death Allegedly Resulting from Television or Radio Broadcast," 20 A.L.R. 4th 327 (1983).

23 L.Ed.2d 430 (1969) was the controlling precedent. It is important to take note of the sharp contrast of facts between *Brandenburg* and the present case. The speech involved in *Brandenburg* was undeniably political in nature. This Court has frequently stated that political speech is "at the heart of First Amendment protection." *First National Bank v. Bellotti,* 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978). By contrast, speech concerning obscure sexual practices intended primarily for "adult" entertainment can hardly be said to be at the core of the values that the framers of the First Amendment intended to protect. Perhaps even more importantly, *Brandenburg* concerned the circumstances under which a state could intervene and punish speech that had a potential to cause harm *before* any harm actually occurred. By contrast, this case involves an attempt by the injured parties to recover damages for harm that *actually occurred* as a result of the speech. This Court has never analyzed whether *Brandenburg* is applicable to this situation and, if so, how it is to be applied. *Cf. Near v. Minnesota,* 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931) (suggesting that the First Amendment provides more protection against "prior restraint" than against punishment after the fact.) Finally, it must be remembered that *Brandenburg* was a criminal prosecution. Despite the language in *New York Times Co. v. Sullivan,* 376 U.S. 254, 265, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), it seems self-evident that criminal prosecution of a speaker provides a greater threat to First Amendment values than a mere civil lawsuit.

Nevertheless, even assuming that it is correct to treat *Brandenburg* as the controlling precedent, the Court of Appeals has misconstrued that case. The Court interpreted *Brandenburg* as requiring a four-part test:

1. The article must "advocate" autoerotic asphyxiation;
2. The article must go beyond "mere advocacy" and amount to incitement; and
3. The article must have been directed toward "imminent action";
4. Autoerotic asphyxiation must be a "lawless" act.

The Court of Appeals held that the article did not "advocate" that anyone engage in the practice therein described, and was therefore protected under its reading of *Brandenburg*. *Brandenburg*, however, involved a prosecution under a state statute which proscribed "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." 395 U.S. at 444-5. The primary issue presented was whether a a State can punish "mere advocacy" of violent or unlawful methods of achieving political goals. This Court concluded that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. It is important to note that the Court did not express any opinion on whether a State could (or could not) punish other forms of speech which were "directed to inciting or producing imminent lawless action. . . ." The essence of the decision is that a State can intervene to punish an immediate and impending evil. The manner or means that a defendant may have used to bring about the impending evil would seem to be a matter of little relevance. Nothing in *Brandenburg*

requires that "advocacy" be the means used to bring about the evil. *See also, NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982) ("[A] finding that his public speeches were likely to incite lawless action could justify holding him responsible. . . ." 458 U.S. at 927. No requirement that the speech "advocate" such action.)

However, even if "advocacy" is an element of the test established in *Brandenburg*, the present article meets that test. It is true that the article does not explicitly instruct the reader to attempt the practice. Nevertheless, the article contains numerous glowing descriptions of the pleasures supposedly achieved by means of the practice. Thus, the article contends that those who engage in the practice achieve "exhileration," "an overpowering feeling of pleasure and oblivion," a high "not unlike the high produced by drugs or some religious rights," and "thrills." As noted by Dr. Silverman, these references "tend to increase in intensity and frequency towards the end of the article." Hustler's argument amounts to a contention that advocacy must be explicit and that there is no such thing as implicit advocacy. On the contrary, advocacy merely requires that one "plead in favor of" something. *Webster's Ninth New Collegiate Dictionary*, at 60 (1985). Surely, providing a glowing list of the benefits involved in a practice constitutes pleading in favor thereof. If *Brandenburg* requires advocacy, it surely does not require that the advocacy be explicit.

The Court of Appeals next emphasized the *Brandenburg* requirement that the speech be "directed to . . . imminent action." Once again, the Court's reading of *Brandenburg* is strained. It seems plain that speech can be "directed to inciting or producing imminent lawless

action" without explicitly urging the listener to "do it *now*." This record shows that the article did, in fact, produce immediate action. The magazine was found open to the article at the feet of the deceased. The jury could believe that the deceased not only read the article, but did so immediately before he attempted the act. This Court suggested in *NAACP v. Claiborne Hardware Co., supra,* that if the "language had been *followed* by acts of violence, a substantial question [of liability] would be presented." 458 U.S. at 928 (emphasis added). Thus, the requirement of "imminence" is more concerned with whether the speech actually produced immediate action or was likely to do so. Even under *Brandenburg,* there is no requirement that the speaker explicitly urge that action be taken immediately. The present article did, in fact, produce immediate action.

Although the Court of Appeals expressed no opinion on the issue, Hustler contended that the article did not produce any "lawless action." Hustler construed "lawless action" to mean *illegal* action and urged that the action produced must constitute a violation of the Penal Code. The long line of cases which preceded *Brandenburg* required only a "clear and present danger of *substantive evils*." *Schenck v. United States,* 249 U.S. 47, 39 S. Ct. 247, 63 L.Ed. 470 (1919). *Brandenburg* arguably modifies those cases by requiring a more direct and immediate connection between the speech and the evils which government is entitled to prevent. However, *Brandenburg* was surely not intended to alter the previous cases with respect to the *types* of evil a government is entitled to prevent. The word "lawless" is used in *Brandenburg* simply because that was the only evil which was pertinent under the facts of that case. *Tinker v. Des Moines Independent*

Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969), decided in the same year as *Brandenburg,* aptly illustrates that a State can prevent speech which creates a danger of evils which do not necessarily constitute a violation of the Penal Code—disruption of classes. Furthermore, Hustler's assumption that "lawless" and "illegal" are exactly synonymous is simply incorrect. Webster's definition of "lawless" lists "unruly" as a synonym as well as "illegal." *Webster's Ninth New Collegiate Dictionary* at 678 (1985). Similarly, the Oxford English Dictionary includes "unbridled" and "licentious" as synonyms for "lawless." 1 *Oxford English Dictionary* at 119 (1979). The death by hanging of a fourteen-year-old boy is surely "lawless action" within the meaning of *Brandenburg.*

B. The *Brandenburg* Test Of "Incitement" Should Be Modified In The Context Of The Present Case:

The absolute view of the First Amendment has long since been rejected. Hustler itself recognizes that there are numerous areas of speech to which the protections of the First Amendment do not extend or extend only to a limited degree. The areas recognized by Hustler includ: (1) obscene material, *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973); (2) fighting words, *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942); (3) defamation, *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974); (4) intolerable invasions of privacy, *Eriznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1973); (5) disruptions of the classroom, *Tinker v. Des Moines Independent Community School District, supra;* (6) in-

citement to imminent lawless activity, *Brandenburg v. Ohio, supra;* and (7) solicitation of illegal activity, *Pittsburgh Press Co. v. Pittsburgh Commission On Human Relations,* 413 U.S. 376, 93 S. Ct. 2553, 37 L.Ed.2d 669 (1973). This list is far from complete. To the list should be added: (8) fraud, *See Schneider v. State,* 308 U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155 (1939); (9) deceptive advertising, *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. ____, 105 S. Ct. 2265, 85 L.Ed.2d 652 (1985); (10) in-person solicitation by a professional, *Ohralik v. Ohio State Bar Ass'n.,* 436 U.S. 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978); (11) profanity on the electronic media, *Federal Communication Comm'n. v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978), (12) commercial speech, *Virginia Pharmacy Board v. Virginia Citizen's Consumer Counsel, Inc.,* 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976); etc. The involvement of a minor brings substantial (sometimes compelling) State interests into play which further limit the reach of First Amendment freedoms. *New York v. Ferber,* 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982).

Probably the most common type of civil lawsuit involving speech is a lawsuit for libel or slander. At first blush, libel and slander cases seem only slightly more similar to the present case than *Brandenburg*. However, actions for libel certainly represent the most significant attempt by this Court to reconcile the interests of an injured plaintiff with the interests protected by the First Amendment. Furthermore, one of the major harms stemming from libel or slander is its tendency to spur others to action, i.e., to not hire the Plaintiff, to shun him socially, etc. The essence of Plaintiff's complaint in the

present case is that the article in question spurred action in a much more direct manner. Thus, a useful analogy can be drawn from a review of the line of cases analyzing the relationship between libelous publications and the First Amendment.

This Court long assumed that libel enjoyed no constitutional protection whatsoever. *Beauharnais v. Illinois,* 343 U.S. 250, 72 S. Ct. 725, 96 L.Ed. 919 (1952) ("Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class." 343 U.S. at 266). However, in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), the Court put significant restrictions on the right of a public official to sue for libel:

> The Constitutional guarantees require, we think, a Federal Rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80.

Four years after the *New York Times* case the Court extended its reasoning to embrace any case in which the Plaintiffff was a "public figure." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967). A few years later, a plurality of the Court voted to extend the *New York Times* rule to a report involving

a private Plaintiff "about the individual's involvement in an event of public or general interest." *Rosenbloom v. Metro Media, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed.2d 296 (1971). In *Gertz v. Robert Welch, Inc., supra*, however, the Court retreated from its previous position. The Court recognized that:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation . . .
>
> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose. . . .

418 U.S. at 341. Thus, the Court concluded that:

> [S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

418 U.S. at 347. The Court, however, concluded that a showing of actual malice was still required for the recovery of presumed or punitive damages.

In *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. ____, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985) the Court further clarified the law. The Court considered the question of whether the rule announced in *Gertz* applies "where the false and defamatory statements involved do not involve matter of public concern." 86 L.Ed.2d at 597.

The Court noted that the *New York Times* case had involved "one of the major public issues of our time." 86 L.Ed.2d at 600, *quoting, New York Times Co. v. Sullivan, supra,* 376 U.S. at 271. The rationale underlying the *New York Times* case was that "debate *on public issues* should be uninhibited, robust, and wide open." 86 L.Ed.2d at 600, *quoting, New York Times,* 376 U.S. at 270 (emphasis added by the Court in *Dun & Bradstreet*). The Court went on to note that the *Gertz* case, too, had involved "expression on a matter of undoubted public concern." 86 L.Ed.2d at 600. The Court explained that "not all speech is of equal First Amendment importance." 86 L.Ed.2d at 602. Instead, "the First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id., quoting, Roth v. United States,* 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957). Thus, "it is speech on 'matters of public concern' that is 'at the heart of the First Amendment protection.'", 86 L.Ed. at 602, *quoting, First National Bank v. Bellotti,* 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978). The *Dun & Bradstreet* Court concluded as follows:

> We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern.

86 L.Ed.2d at 605.[4]

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4. This, of course, was the plurality opinion of three Justices. Chief Justice Burger, concurring, stated the even more restrictive position that *Gertz* is limited to matters of "general public importance." 86 L.Ed.2d at 606. Justice White, concurring, took the even more conservative position that *Gertz* and *New York Times* should be overruled.

Thus, over a period of eighteen years, this Court evolved a test whereby the degree of First Amendment protection afforded an allegedly libelous publication depends on two factors: (1) The nature of the Plaintiff; and (2) the nature of the publication. Thus, if the Plaintiff is a public official or other "public figure", the publication is afforded more protection than if the Plaintiff is a private individual. If the publication involves political or social issues, it is afforded more protection than publications which "do not involve matters of public concern." These factors, the nature of the Plaintiff and the nature of the publication, are balanced against the State interest in awarding damages to the person injured by the publication.

These considerations strongly indicate that the test of incitement found in *Brandenburg* must be modified significantly when applied to the case at hand. As previously noted, *Brandenburg* involved a *criminal* prosecution for speech which was clearly *political* and which had not caused harm, but merely had the *potential* to do so. Many cases, in addition to *Dun & Bradstreet,* hold that political speech is entitled to the highest of First Amendment protection. *Federal Election Comm'n. v. National Conservative Political Action Committee,* 470 U.S. ____, 105 S. Ct. 1459, 84 L.Ed.2d 455 (1985) ("Discussion of public issues and debate on the qualifications of candidates are intrical to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression. . . ." 84 L.Ed.2d at 467, *quoting, Buckley v. Valeo,* 424 U.S. 1, 14, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976)); *Carey v. Brown,* 447 U.S. 455, 100 S. Ct. 2286, 65 L.Ed.2d 263 (1980) ("The maintenance of the op-

portunity for free political discussion . . . is a fundamental principle of our constitutional system." 447 U.S. at 467, *quoting, Stromberg v. California,* 283 U.S. 359, 369, 51 S. Ct. 532, 75 L.Ed. 1117 (1931)); *First National Bank v. Bellotti, supra* ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 435 U.S. at 776-7, *quoting, Mills v. Alabama,* 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L.Ed.2d 484 (1966)). Thus, it is unsurprising that, analogous to the high test of malice required by *New York Times* for a public official to recover for libel, *Brandenburg* required a rather high test of incitement to sustain a criminal prosecution for a political speech. By contrast, speech of the nature presently before the Court, even if not constitutionally obscene and entitled to no protection whatsoever, is not entitled to the full protection afforded political speech. *See Federal Communications Comm'n. v. Pacifica Foundation, supra,* 438 U.S. at 743 (stating that "patently offensive references to excretory and sexual organs and *activities* . . . surely lie at the periphery of First Amendment concern." (emphasis added)); *cf., Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L.Ed.2d 154 (1976) (prominent socialite's divorce was not a matter of "public controversy"). To paraphrase the *Dun & Bradstreet* opinion "there is simply no credible argument that this type of [speech] requires special protection to insure that 'debate on public issues [will] be uninhibited, robust, and wide open.' " 86 L.Ed.2d at 604, *quoting, New York Times v. Sullivan, supra,* 376 U.S. at 270. On the other hand, the Supreme Court has recognized that it is "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being

of a minor' is 'compelling.' " *New York v. Ferber, supra,* 458 U.S. at 756-7, *quoting, Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607, 102 S. Ct. 2613, 73 L.Ed.2d 248 (1982). Thus, it seems clear that, by analogy to the modification of the *New York Times* "actual malice" test found in *Gertz* and *Dun & Bradstreet,* the *Brandenberg* incitement test should be relaxed in its application to the case at hand. *Cf. New York v. Ferber, supra,* 458 U.S. at 764 (relaxing the *Miller* test for obscenity when applied to child pornography.).

The next step, of course, is to analyze in what manner the incitement test should be modified. The most obvious modification is suggested by *Gertz* itself. The most significant holding of *Gertz* was to modify the "actual malice" test of *New York Times* to simple negligence when the Plaintiff was a private individual. Surely, in a civil case involving non-political speech the *Brandenburg* requirement that the speech be *"directed to* inciting or producing imminent lawless action" should be modified to a requirement that the defendant knew or should have known that his speech would cause severe injury.

A second modification relates to the degree of imminence of the evil spurred by the speech. Here, a useful analogy can be drawn from some of the earliest cases interpreting the First Amendment. The precursor to the *Brandenburg* incitement test is found in *Schenck v. United States, supra.* There, the Court, speaking through Justice Holmes, established (before there was any ordinary test of incitement) a relaxed test of incitement applicable to the exigencies of war time. The defendants were prosecuted for speech which was undoubtedly political. They circulated a pamphlet to draftees urging them to protest the draft. The pamphlet argued, among other things, that

the draft was a clear violation of the Thirteenth Amendment. Mr. Justice Holmes rejected the contention that the convictions violated the First Amendment:

> We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. [citation omitted] The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

249 U.S. at 52. Thus, the original test did not require advocacy of imminent lawless action (as Hustler interprets *Brandenburg*), but merely words creating a "clear and present *danger*" of "substantive evils." *See also, Debs v. United States,* 249 U.S. 211, 39 S. Ct. 252, 63 L.Ed. 566 (1919) (another opinion by Mr. Justice Holmes which restates the "clear and present danger" test as requiring that the words have "as their natural tendency and reasonably probable effect" to bring about an evil which Congress has the right to control.)

In *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L.Ed. 1137 (1951) the Court provided a further interpretation of the "clear and present danger" test. The Court construed the test as requiring an evaluation of the magnitude of the evil sought to be avoided and the immediacy of the danger. If the evil is sufficiently great, the government may punish speech tending to promote

the evil well before the evil becomes imminent. Thus, the government need not "wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited" before acting. 341 U.S. at 509.

More recently, in the same term of Court in which *Brandenburg* was decided, the Court applied a relaxed incitement test in the context of the public schools. *Tinker v. Des Moines School District, supra.* There, petitioners were suspended from school for wearing black arm bands to publicize their protest of the war in Vietnam. The Court upheld the challenge to the constitutionality of the suspension, but applied a test much less stringent than that found in *Brandenburg.* The Court held that political expression in a public school environment can be prohibited where it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." 393 U.S. at 505, *quoting, Burnside v. Byars,* 363 F.2d 744, 749 (5th Cir. 1966). Thus, *Tinker* illustrates that something similar to the "clear and present danger" test is still applicable to political expression under special circumstances. Surely, at a minimum, the *Brandenburg* "imminent lawless action" test should be modified to a "clear and present danger" test in the context of a civil action for non-political speech.

The most recent Supreme Court case involving a claim of incitement, *NAACP v. Claiborne Hardware Co., supra,* lends further support to this conclusion. There, numerous members of the black community of a small Mississippi town engaged in a boycott of white merchants to protest racial inequality. The white merchants filed suit against approximately 150 defendants based on a variety of allegations, including anti-trust violations and a Mississippi common law tort, "malicious interference with a trade

or calling." The Mississippi Courts sustained a recovery based on the latter theory.

The Supreme Court reversed almost all aspects of the judgment. What is relevant here is the Court's discussion regarding the liability of Charles Evers, a leader of the NAACP. Mr. Evers liability was based on four public speeches made by him. Most aspects of the speeches called for unity in the joint effort and for social ostracism of those blacks who violated the boycott. However, at least one of the speeches referred to "the possibility that necks would be broken and to the fact that the sheriff could not sleep with boycott violators at night." 458 U.S. at 927. The boycott had, in fact, involved a few isolated instances of violence, but all such instances were well-separated in time from Mr. Evers' speeches, and there was no evidence that his speeches were the immediate cause of any specific incident. Thus, the Court faced the issue of whether the speeches in question could form the basis of civil liability.

The Court first noted the exact nature of the speech in question:

> Since Respondents would impose liability on the basis of a public address—which predominantly contained highly charged *political* rhetoric lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care.

458 U.S. at 926-7 (emphasis added). The Court proceeded to cite with approval both *Schenck* and *Brandenburg*. The Court stated that "a finding that [Evers] public speeches were *likely to incite lawless action* could justify holding him liable for unlawful conduct that in fact

followed within a reasonable period." Id. at 927 (emphasis added). Furthermore, "[i]f that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case . . . the acts of violence . . . occurred weeks or months after the . . . speech." *Id.* at 928. Thus, the Court concluded that the speeches "did not transcend the bounds of protected speech set forth in *Brandenburg." Id.*

Although the Court cited both *Schenck* and *Brandenburg* and explicitly relied on the latter, the test applied was, in fact, much closer to *Schenck*. A requirement that the speech be "likely to incite lawless action . . . within a reasonable period" (*NAACP*) sounds much closer to a requirement of "clear and present danger [of] substantive evils" (*Schenck*) than to a requirement of "directed to inciting or producing imminent lawless action and . . . likely to . . . produce such action." (*Brandenburg*). Thus, in a civil case, even in a case involving purely political speech and a claim of mere economic damages, the Court applied a less stringent test of incitement that that found in *Brandenburg*. Surely, in a case involving physical injury and non-political speech the *Brandenburg* test should be substantially relaxed.

In short, civil liability does not conflict with the First Amendment where a defendant engages in speech which he knows or should know will create a "clear and present danger" of spurring action which causes severe personal injuries or death, and where such injuries or death actually follow within a reasonable period of time.

PRAYER FOR RELIEF

Petitioner urges the Court to grant a Writ of Certiorari and, after hearing the merits, reverse the judgment of the Court of Appeals.

Respectfully submitted,

HAYNES & FULLENWEIDER,
A Professional Legal Corporation

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition For Writ of Certiorari was mailed to David H. Donaldson, Jr., GRAVES, DOUGHERTY, HEARON & MOODY, 2300 Interfirst Tower, P. O. Box 98, Austin, Texas 78767 by U.S. mail, certified, return receipt requested this _____ day of July, 1987.

_____

APPENDIX A

Diane HERCEG, and Andy V.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

HUSTLER MAGAZINE, INC.,
Defendant-Appellant,
Cross-Appellee.

No. 85-2833.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

April 20, 1987.

Mother and friend of adolescent brought action against magazine publisher to recover damages for emotional and physical harm suffered as result of adolescent's death allegedly caused by magazine article which described practice of autoerotic asphyxia. The United States District Court for the Southern District of Texas, Woodrow B. Seals, J., entered judgment on jury verdict in favor of mother and friend and denied publisher's motions for judgment notwithstanding verdict or new trial. Publisher appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) magazine article did not incite adolescent to perform act that led to death by hanging, therefore, it was entitled to First Amendment protection, and (2) imposition of civil liability for damages that resulted from publication of magazine article violated First Amendment.

Reversed.

Edith H. Jones, Circuit Judge, concurred in part, dissented in part, and filed opinion.

David H. Donaldson, Jr., Jack N. Price, Austin, Tex., for defendant-appellant, cross-appellee.

Clinard J. Hanby, Michael M. Essmyer, Haynes & Fullenweider, Houston, Tex., for plaintiffs-appellees, cross-appellants.

Appeals from the United States District Court for the Southern District of Texas.

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

An adolescent read a magazine article that prompted him to commit an act that proved fatal. The issue is whether the publisher of the magazine may be held liable for civil damages.

I.

In its August 1981 issue, as part of a series about the pleasures—and dangers—of unusual and taboo sexual practices, *Hustler Magazine* printed "Orgasm of Death," an article discussing the practice of autoerotic asphyxia. This practice entails masturbation while "hanging" oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm. The article included details about how the act is performed and the kind of physical pleasure those who engage in it seek to achieve. The heading identified "Orgasm of Death" as part of a series on "Sexplay," discussions of "sexual pleasures [that] have remained hidden for too long behind the doors of

fear, ignorance, inexperience and hypocrisy" and are presented "to increase [readers'] sexual knowledge, to lessen [their] inhibitions and—ultimately—to make [them] much better lover[s]."

An editor's note, positioned on the page so that it is likely to be the first text the reader will read, states: "Hustler emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia,' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose."

The article begins by presenting a vivid description of the tragic results the practice may create. It describes the death of one victim and discusses research indicating that such deaths are alarmingly common: as many as 1,000 United States teenagers die in this manner each year. Although it describes the sexual "high" and "thrill" those who engage in the practice seek to achieve, the article repeatedly warns that the procedure is "neither healthy nor harmless," "it is a serious—and often-fatal—mistake to believe that asphyxia can be controlled," and "beyond a doubt—. . . auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe." The two-page article warns readers at least ten different times that the practice is dangerous, self-destructive and deadly. It states that persons who successfully perform the technique can achieve intense physical pleasure, but the attendant risk is that the person may lose consciousness and die of strangulation.

Tragically, a copy of this issue of Hustler came into the possession of Troy D., a fourteen-year-old adolescent,

who read the article and attempted the practice. The next morning, Troy's nude body was found, hanging by its neck in his closet, by one of Troy's closest friends, Andy V. A copy of *Hustler Magazine*, opened to the article about the "Orgasm of Death," was found near his feet.

Invoking the diversity jurisdiction of a federal court, Troy's mother, Diane Herceg, and Andy V. sued Hustler to recover damages for emotional and psychological harms they suffered as a result of Troy's death and for exemplary damages. Their original complaint alleged that Hustler was responsible for Troy's death on grounds of negligence, products liability, dangerous instrumentality, and attractive nuisance. In response, Hustler filed a motion to dismiss the complaint for failure to state a claim. The district court granted Hustler's motion on the basis that Texas law did not support some of the claims and others were barred by the first amendment, but it noted that the first amendment did not bar claims based on incitement and that it was "conceivable that plaintiffs could prove facts showing that Hustler's article was 'directed to inciting or producing' [Troy's death and] was 'likely to incite or produce' the death." It therefore granted leave to the plaintiffs to amend the complaint "to add an allegation of incitement."[1] The plaintiffs subsequently filed an amended complaint reasserting the claims previously raised and adding an allegation that Troy had read the article and was incited by it to perform the act that resulted in his death. Hustler responded by filing a motion for summary judgment. The district court treated the

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1. *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802 (S.D. Tex. 1983), relying on *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D. Fla. 1979) and quoting from *Oliva N. v. National Broadcasting System*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981).

motion as a motion to dismiss, granted the motion, and dismissed the suit insofar as it was based on any theory except incitement.

The incitement claim was then tried before a jury. Expert witnesses testified on behalf of both the plaintiffs and the defendant about the psychological implications of Troy's behavior and whether the magazine article implicitly advocated the practice it described or was likely to incite readers to attempt the procedure. The jury returned a verdict in favor of the plaintiffs awarding Diane Herceg $69,000 in actual damages and $100,000 exemplary damages and awarding Andy V. $3,000 for the pain and mental suffering he endured as the bystander who discovered Troy's body and $10,000 exemplary damages. Hustler moved for a judgment notwithstanding the verdict or for a new trial, and the plaintiffs moved to amend the judgment to provide for pre-judgment interest. The trial court denied both motions. Hustler appeals, but the plaintiffs do not cross appeal or raise any issue concerning the correctness of the district court order dismissing their other claims.

II.

The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas. Under our Constitution, as the Supreme Court has reminded us, "there is no such thing as a false idea. However, pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the

competition of other ideas.'"[2] We rely on a reverse Greshom's law, trusting to good ideas to drive out bad ones and forbidding governmental intervention into the free market of ideas. One of our basic constitutional tenets, therefore, forbids the state to punish protected speech, directly or indirectly, whether by criminal penalty[3] or civil liability.[4]

The Supreme Court has recognized that some types of speech are excluded from, or entitled only to narrowed constitutional protection. Freedom of speech does not protect obscene materials,[5] child pornography,[6] fighting words,[7] incitement to imminent lawless activity,[8] and purposefully-made or recklessly-made false statements of fact such as libel, defamation, or fraud.[9] Whatever the

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2. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2997, 3007, 41 L.Ed.2d 789 (1974) (footnote omitted).

3. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 107-08, 94 S. Ct. 326, 328, 38 L.Ed.2d 303 (1973); *Gooding v. Wilson*, 405 U.S. 518, 521-22, 92 S. Ct. 1103, 1106, 31 L.Ed.2d 408 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 447-48, 89 S. Ct. 1827, 1829-30, 23 L.Ed.2d 430 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237, 83 S. Ct. 680, 684, 9 L.Ed.2d 697 (1963).

4. *New York Times v. Sullivan*, 376 U.S. 254, 277, 84 S. Ct. 710, 724, 11 L.Ed.2d 686 (1964).

5. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973); *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957).

6. *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed. 2d 1113 (1982).

7. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942).

8. *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969).

9. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S. Ct. 2265, 85 L.Ed.2d 652 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974); *Beau-*

problems created in attempting to categorize speech in such fashion,[10] the Hustler article fits none of them.

[1, 2] Even types of speech protected generally by the first amendment may be subject to government regulation. Freedom of speech is not an absolute.[11] If the state interest is compelling and the means of regulation narrowly tailored to accomplish a proper state purpose, regulation of expression is not forbidden by the first amendment. The extent of the danger created by a publication therefore is not immaterial in determining the state's power to penalize that publication for harm that ensues, but first amendment protection is not eliminated simply because publication of an idea creates a potential hazard. Whether the Hustler article, therefore, placed a dangerous idea into Troy's head is but one factor in determining whether the state may impose damages for that consequence. Against the important social goal of protecting the lives of adolescents like Troy, the Constitution requires us to balance more than Hustler's right to publish the particular article, subject to the possibility of civil liability should harm ensue, but also the danger that unclear or diminished standards of first amendment protection may both inhibit the expression of protected ideas by other speakers and constrict the right of the public to receive those ideas.[12]

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harnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L.Ed. 919 (1952); *Schneider v. State*, 308 U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155 (1939). *See also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 n. 22, 104 S. Ct. 1949, 1961 n. 22, 80 L.Ed.2d 502 (1984).

10. *See* Gunther, Constitutional Law 1046 (11th ed. 1985).

11. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49, 81 S. Ct. 997, 1005, 6 L.Ed.2d 105 (1961), *reh. denied*, 368 U.S. 869, 82 S. Ct. 21, 7 L.Ed.2d 69 (1961).

12. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 93 S. Ct. 2080, 36 L.Ed.2d 772 (1973).

While the plaintiffs alleged several different bases of liability in their original amended complaint, the issue tried was the imposition of liability on the basis of incitement, and that is the sole basis for the verdict. The question before us therefore is whether, as a matter of law, the language of "Orgasm of Death" may be defined as incitement for purposes of removing that speech from the purview of first amendment protection. If not, the judgment entered on the jury verdict cannot be affirmed even if it is conceivable that, had the case been tried on some other ground, the jury might have reached the same verdict.[13]

III.

Appellate review of jury findings in cases implicating first amendment rights must remain faithful both to the clearly erroneous standard set forth in Rule 52(a)[14] and the constitutional obligation of appellate courts "to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' "[15]

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13. *See Dees v. W.M. Webb, Inc.*, 590 F.2d 144, 146 (5th Cir. 1979); *Short v. United Mine Workers of America 1950 Pension Trust*, 728 F.2d 528, 532 n. 6 (D.C. Cir. 1984) (citing *Kassman v. American University*, 546 F.2d 1029, 1032 (D.C. Cir. 1976) (per curiam)); *Chesapeake & Ohio Railway Co. v. Illinois Central Gulf Railroad Co.*, 564 F.2d 222, 226 (7th Cir. 1977), *cert. denied*, 435 U.S. 919, 98 S. Ct. 1515, 55 L.Ed.2d 535 (1978); *Santa Clara Valley Distributing v. Pabst Brewing Co.*, 556 F.2d 942, 946 (9th Cir. 1977).

14. *See, e.g., Mack v. Newton*, 737 F.2d 1343, 1350 (5th Cir. 1984); *Gross v. Black and Decker (U.S.), Inc.*, 695 F.2d 858 (5th Cir. 1983).

15. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 284-86, 84 S. Ct. 710, 728-29, 11 L.Ed.2d 686 (1964)).

Although we must accept the jury's fact findings if they are fairly supported by the record, that requirement "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."[16]

The text of the Hustler article provides the best basis for deciding whether the article may be held to have incited Troy's behavior. The jury was also entitled to consider evidence concerning whether Troy read the article immediately prior to attempting the autoerotic asphyxiation procedure, the psychiatric testimony about the likely effect such an article would have on normal adolescent readers, and the evidence about the probable state of his mind at the time he entered upon the experiment that resulted in his death. Although the jury was not asked to answer special interrogatories establishing what evidence they credited or discredited, it is apparent from the verdict that the jurors believed the testimony leading to the conclusion that Troy had read the article immediately before he entered in the acts that proved fatal and that his reaction to the article was not the result of any clinical psychological abnormality. Because these conclusions are adequately supported by evidence in the record, we accept them as true.

[3] We are not free, however, as the Supreme Court's recent decision in *Bose Corporation v. Consumer's Union* holds, to accept the jury's mixed finding of fact and law that the article culpably incited Troy's behavior without conducting "an independent review of the record both

16. *Id.*, 104 S. Ct. at 1960 (citations omitted).

to be sure the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited."[17]

[4] Although we are doubtful that a magazine article that is no more direct than "Orgasm of Death" can ever constitute an incitement in the sense in which the Supreme Court—in cases we discuss below—has employed that term to identify unprotected speech the states may punish without violating the first amendment, we first analyze the evidence on the theory that it might satisfy doctrinal tests relating to incitement, for that was the theory under which the case was tried and submitted. Substituting our judgment for the jury's, as we must, we hold that liability cannot be imposed on Hustler on the basis that the article was an incitement to attempt a potentially fatal act without impermissibly infringing upon freedom of speech.

The word incitement, like many of the words in our complex language, can carry different meanings. It is properly used to refer to encouragement of conduct that might harm the public such as the violation of law or the use of force. But when the word is used in that context, the state may not punish such an inducement unless the speech involved is, as the Supreme Court held in *Brandenburg v. Ohio*,[18] "directed to inciting or producing *imminent* lawless action and . . . *likely* to incite or produce such action."[19]

17. 104 S. Ct. at 1962.

18. 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969).

19. *Id.*, 395 U.S. at 447, 89 S. Ct. at 1829 (emphasis added).

Brandenburg, a Ku Klux Klan leader garbed in Klan regalia, had delivered a speech threatening that, "if our President, our Congress, our Supreme Court, continues to suppress the white, caucasion race, it is possible that there might have to be some revengence (sic) taken." He challenged his conviction under an Ohio statute that punished "advocacy of the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[20] The Supreme Court reversed his conviction because neither the statute nor the state court's jury instruction distinguished between advocacy and incitement to imminent lawless action, and only the latter might constitutionally be forbidden.

Hustler argues that *Brandenburg* provides the controlling principle, and the plaintiffs assume that it may. If that were so, it would be necessary for the plaintiffs to have proved that:

1. Autoerotic asphyxiation is a lawless act.

2. Hustler advocated this act.

3. Hustler's publication went even beyond "mere advocacy" and amounted to incitement.

4. The incitement was directed to imminent action.

The *Brandenburg* focus is repeated in subsequent Supreme Court decisions. Thus, in *Hess v. Indiana*,[21] the Court held provocative remarks by a demonstrator to the police could not be punished on the basis that they had a tendency to lead to violence because there was

20. Ohio Rev. Code Ann. § 2923.13 (repealed 1971).

21. 414 U.S. 105, 94 S. Ct. 326, 38 L.Ed.2d 303 (1973).

no evidence that, or rational inference from, the import of the language that "[the] words [used] were intended to produce, and likely to produce, *imminent* disorder."[22]

The crucial element to lowering the first amendment shield is the imminence of the threatened evil. In *Hess,* the Court was faced with the question of whether an antiwar demonstrator could be punished under Indiana's disorderly conduct statute for loudly shouting, "We'll take the fucking street later," as police attempted to move the crowd of demonstrators off the street so that vehicles could pass. The Court noted that, viewed most favorably to the speaker, "the statement could be taken as counsel for moderation" and, at worst, as "advocacy of illegal action at some indefinite future time."[23] The Court reasoned that, "[s]ince the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished . . .on the ground that they had 'a tendency to lead to violence.' "[24]

We need not decide whether Texas law made autoerotic asphyxiation illegal or whether *Brandenburg* is restricted to the advocacy of criminal conduct. Even if the article paints in glowing terms the pleasures supposedly achieved

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22. *Id.,* 414 U.S. at 109, 94 S. Ct. at 329 (emphasis in original). *See also Watts v. United States,* 394 U.S. 705, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam).

23. 414 U.S. at 108, 94 S. Ct. at 328.

24. *Id.,* 414 U.S. at 108-09, 94 S. Ct. at 329 (citations omitted; emphasis in original).

by the practice it describes, as the plaintiffs contend, no fair reading of it can make its content advocacy, let alone incitement to engage in the practice.

Herceg and Andy V. complain that the article provides unnecessary detail about how autoerotic asphyxiation is accomplished. The detail is adapted from an article published by a psychiatrist in the *Journal of Child Psychiatry*. Although it is conceivable that, in some instances, the amount of detail contained in challenged speech may be relevant in determining whether incitement exists, the detail in "Orgasm of Death" is not enough to permit breach of the first amendment. The manner of engaging in autoerotic asphyxiation apparently is not complicated. To understand what the term means is to know roughly how to accomplish it. Furthermore, the article is laden with detail about all facets of the practice, including the physiology of how it produces a threat to life and the seriousness of the danger of harm.

Under *Brandenburg,* therefore, the article was entitled to first amendment protection. But the parties' and, apparently, the district court's effort to apply the *Brandenburg* analysis to the type of "incitement" with which Hustler was charged appears inappropriate. Incitement cases usually concern a state effort to punish the arousal of a crowd to commit a criminal action. The root of incitement theory appears to have been grounded in concern over crowd behavior. As John Stuart Mill stated in his dissertation, *On Liberty,* "An opinion that corn-dealers are starvers of the poor, or that private property is robbery ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an exicted mob assembled before the

house of a corn-dealer."[25] In *Noto v. United States,*[26] the Supreme Court expressed similar views about incitement: "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action."[27] Whether written material might ever be found to create culpable incitement unprotected by the first amendment is, however, a question that we do not now reach.

IV.

[5] Herceg and Andy V. contend that, while the first amendment might prevent the state from punishing publication of such articles as criminal, it does not foreclose imposing civil liability for damages that result from publication. In *New York Times v. Sullivan,* the Supreme Court held, "what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel," because the fear of civil liberty might be "markedly more inhibiting than the fear of prosecution under a criminal statute."[28] The same rationale forbids the state to impose damages for publication of "Orgasm of Death" if it could not constitutionally make the publication of that article a crime.

One state Supreme Court decision, however, may be read to imply that the state may impose civil liability in

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25. 367 U.S. 290, 81 S. Ct. 1517, 6 L.Ed.2d 836 (1961).

26. *Id.,* 367 U.S. at 297-98, 81 S. Ct. at 1520-21.

27. *See also Brandenburg,* 395 U.S. at 448, 89 S. Ct. at 1830; *Herndon v. Lowry,* 301 U.S. 242, 259-61, 57 S. Ct. 732, 739-40, 81 L.Ed. 1066 (1937); *Bond v. Floyd,* 385 U.S. 116, 134, 87 S. Ct. 339, 348, 17 L.Ed.2d 235 (1966).

28. 376 U.S. 254, 277, 84 S. Ct. 710, 724, 11 L.Ed.2d 686 (1964).

such a situation. In *Weirum v. RKO General, Inc.*,[29] the Supreme Court of California held that a radio station catering primarily to teenagers could be held liable for wrongful death damages arising from an accident caused when two youths who listened to a promotional broadcast engaged in a street race in order to be the first to reach the site at which the station had announced prize money would be given away. Most of the opinion dealt with whether the radio station owed a duty of care to the killed non-listener, and the first amendment defense was summarily rejected because "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."[30]

As the California court itself noted, "virtually every act involves some conceivable danger."[31] The analysis employed by the California Supreme Court, however, provides no guidance for distinguishing between protected speech containing—or implying—dangerous ideas and speech so clearly and immediately dangerous and "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[32] Because the speech challenged was merely a promotional device to encourage listeners to continue listening to the radio station, it may have been entitled only to limited first amendment protection.[33] The broadcast announcements included

29. 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975).

30. 123 Cal. Rptr. at 472, 539 P.2d at 40.

31. *Id.*

32. *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. at 769.

33. *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) (over-

light-hearted warnings that listeners should "get your kids out of the street"[34] because of the reckless driving that the announcement might incite, and no warning of any kind was given to urge listeners who sought to win the prizes to use discretion in driving. In contrast, the Hustler article, while published in a magazine published for profit, was not an effort to achieve a commercial result and, at least in the explicit meaning of the words employed, attempts to dissuade its readers from conducting the dangerous activity it describes.

V.

[6] In the alternative, Herceg and Andy suggest that a less stringent standard than the *Brandenburg* test be applied in cases involving non-political speech that has actually produced harm. Although political speech is at "the core of the First Amendment,"[35] the Supreme Court generally has not attempted to differentiate between different categories of protected speech for the purposes of deciding how much constitutional protection is required.[36] Such an endeavor would not only be hopelessly complicated but would raise substantial concern that the worthi-

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ruling the holding in *Valentine v. Chrestensen,* 316 U.S. 52, 62 S. Ct. 920, 86 L.Ed. 1262 (1942), that commercial speech enjoys no first amendment protection).

34. *Weirum,* 123 Cal. Rptr. at 470, 539 P.2d at 38.

35. *N.A.A.C.P. v. Claiborne Hardware Co.,* 458 U.S. 886, 926-27, 102 S. Ct. 3409, 3433, 73 L.Ed.2d 1215 (1982).

36. *But see Virginia State Board of Pharmacy, supra; Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 103 S. Ct. 2875, 77 L.Ed. 2d 469 (1983); *Central Hudson Gas v. Public Service Commission,* 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978); *In re Primus,* 436 U.S. 412, 98 S. Ct. 1893, 56 L.Ed.2d 417 (1978).

ness of speech might be judged by majoritarian notions of political and social propriety and morality. If the shield of the first amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as "bad," all free speech becomes threatened. An article discussing the nature and danger of "crack" usage—or of hang-gliding—might lead to liability just as easily. As is made clear in the Supreme Court's decision in *Hess*, the "tendency to lead to violence" is not enough.[37] Mere negligence, therefore, cannot form the basis of liability under the incitement doctrine any more than it can under libel doctrine.[38]

VI.

Finally, even if this court were to determine that the plaintiffs may establish a cause of action under a theory of negligence, that theory could not form the basis of affirming the decision below. Plaintiffs correctly argue that an appellee, without cross-appealing, may defend the judgment on any basis having support in the record.[39] This case, however, was not tried on a negligence theory. There are, therefore, no jury findings on the issue of negligence, and this court may not infer what those findings would have been had the issue been presented. The trial was conducted on an incitement theory after the

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37. 414 U.S. at 109, 94 S. Ct. at 329.

38. *Accord, Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981).

39. *French v. Estelle*, 692 F.2d 1021, 1024 n. 5 (5th Cir. 1982), *cert. denied*, 461 U.S. 937, 103 S. Ct. 2108, 77 L.Ed.2d 313 (1983); *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1106 (5th Cir. 1981); *Lucas v. American Manufacturing Co.*, 630 F.2d 291, 294 (5th Cir. 1980).

plaintiffs' various other claims were dismissed. The defense prepared its defense accordingly. Had a negligence claim remained, Hustler may have settled out of court or pursued alternative defense strategies. To allow Hustler's victories at the summary judgment phase of trial to become a trap precluding it from preparing a negligence defense would be a miscarriage of justice.[40]

VII.

Hustler's final challenge to the judgment below is to the award granted Andy V. as compensation for suffering he endured as a bystander to the tragedy. Because we have held that no liability can attach to Hustler's publication of "Orgasm of Death" under incitement theory, we need not decide whether Andy V. would have been entitled to recover damages under Texas tort law.

For the reasons stated above, the judgment of the district court is REVERSED.

EDITH H. JONES, Circuit Judge, Concurring and Dissenting:

I concur in the result in this case only because I am persuaded that plaintiffs had an obligation to cross-appeal the court's dismissal of their claims based on negligence, attractive nuisance, and strict liability or dangerous instrumentality. The majority correctly reason that Hustler should have had an opportunity to prepare a defense specifically tailored against any of these theories. Although I believe a tort claim is here defensible, the

40. *See, e.g., Gilbert v. Medical Economics Co.*, 665 F.2d 305, 310 (10th Cir. 1981); *System Operations v. Scientific Games Development Corp.*, 555 F.2d 1131, 1144-45 (3d Cir. 1977).

undeniable novelty of plaintiff's "incitement" theory does not permit us fairly to support the judgment below.

What disturbs me to the point of despair is the majority's broad reasoning which appears to foreclose the possibility that any state might choose to temper the excesses of the pornography business by imposing civil liability for harms it directly causes. Consonant with the first amendment, the state can protect its citizens against the moral evil of obscenity,[1] the threat of civil disorder or injury posed by lawless mobs[2] and fighting words,[3] and the damage to reputation from libel or defamation,[4] to say nothing of the myriad dangers lurking in "commercial speech."[5] Why cannot the state then fashion a remedy to protect its children's lives when they are endangered by suicidal pornography? To deny this possibility, I believe, is to degrade the free market of ideas to a level with the black market for heroin. Despite the

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1. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973).

2. *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969).

3. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942).

4. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964).

5. *See, e.g., Posadas De Puerto Rico Association v. Tourism Company of Pureto Rico*, _____U.S._____, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986); *Central Hudson Gas & Electric Corp v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed. 2d 341 (1980); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976).

grand flourishes of rhetoric in many first amendment decisions concerning the sanctity of "dangerous" ideas, no federal court has held that death is a legitimate price to pay for freedom of speech.

In less emotional terms, I believe the majority has critically erred in its analysis of this case under existing first amendment law. The majority decide at the outset that Hustler's "Orgasm of Death" does not embody child pornography, fighting words, incitement to lawless conduct, libel, defamation or fraud, or obscenity,[6] all of which categories of speech are entirely unprotected by the first amendment. Nor do they find in the article "an effort to achieve a commercial result," which would afford it modified first amendment protection. Comforted by the inapplicability of these labels, they then accord this article full first amendment protection, holding that in the balance struck between society's interest in Troy's life and the chilling effect on the "right of the public to receive . . . ideas," Troy loses. Any effort to find a happier medium, they conclude, would not only be hopelessly complicated but would raise substantial concerns that the worthiness of speech might be judged by "majoritarian notions of political and social propriety and morality." I agree that "Orgasm of Death" does not conveniently match the current categories of speech defined for first amendment purposes. Limiting its constitutional protection does not, however, disserve any of these categories and is more appropriate to furthering the "majoritarian" notion of protecting the sanctity of human life. Finally, the "slippery slope argument that if Hustler is held liable here, *Ladies Home Journal* or the publisher of an article

6. Counsel for Hustler essentially conceded in the trial court that their magazine was obscene.

on hang-gliding will next be a casualty of philistine justice simply proves too much: *This* case is not a difficult one in which to vindicate Troy's loss of life.

I.

Proper analysis must begin with an examination of *Hustler* generally and this article in particular. *Hustler* is not a bona fide competitor in the "marketplace of ideas." It is largely pornographic, whether or not technically obscene. One need not be male to recognize that the principal function of this magazine is to create sexual arousal. Consumers of this material so partake for its known physical effects much as they would use tobacco, alcohol or drugs for their effects. By definition, pornography's appeal is therefore non-cognitive and unrelated to, in fact exactly the opposite of, the transmission of ideas.[7]

Not only is Hustler's appeal noncognitive, but the magazine derives its profit from that fact. If Hustler stopped being pornographic, its readership would vanish.

According to the trial court record, poronography appeals to pubescent males. Moreover, although sold in the "adults only" section of newsstands, a significant portion of its readers are adolescent. Hustler knows this. Such readers are particularly vulnerable to thrillseeking, recklessness, and mimickry. Hustler should know this. Hustler should understand that to such a mentality the warnings "no" or "caution" may be treated as invitations rather than taboos.

"Orgasm of Death" provides a detailed description how to accomplish autoerotic asphyxiation. The article appears

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7. *See* Sunstein, "Pornography and the First Amendment," 1986 Duke L.J. 589, 606-07 (1986).

in the "Sexplay" section of the magazine which, among other things, purports to advise its readers on "how to make you a much better lover."[8] The warnings and cautionary comments in the article could be seen by a jury to conflict with both the explicit and subliminal message of Hustler, which is to tear down custom, explode myths and banish taboos about sexual matters. The article trades on the symbiotic connection between sex and violence.[9] In sum, as Hustler knew, the article is dangerously explicit, lethal, and likely to be distributed to those members of society who are most vulnerable to its message. "Orgasm of Death," in the circumstances of its publication and dissemination, is not unlike a dangerous nuisance or a stick of dynamite in the hands of a child. Hustler's publication of this particular article bears the seeds of tort liability although, as I shall explain, the theory on which the case was tried is incorrect.

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8. The introduction to the Sexplay section states: "Many sexual pleasures have remained hidden for too long. . . . In keeping with HUSTLER's belief that the repression of natural and healthy urges is physically and emotionally damaging, we present this series of informative articles to increase your sexual knowledge, lessen your inhibitions and—ultimately to make you a much better lover."

9. The Attorney General's Commission on Pornography concluded recently that the assumption that pornography has "no negative effects" is no longer tenable. *Attorney General's Commission on Pornography: Final Report*, Vol. I at 1031 (July 1986) (hereinafter cited as the *Commission Report*). The Commission concluded that there is a direct causal relationship between exposure to sexually violent materials and anti-social sexual violence and, with some segments of the population, with unlawful acts of violence. *Id.* at 326. The Commission also concluded that substantial exposure to degrading but "non-violent" sexual material, bears "some causal relationship to the level of sexual violence, sexual coercion, or unwanted sexual aggression in the population so exposed." *Id.* at 334. *See also* F. Schauer, *The Law of Obscenity* 62 (1976) (concluding that a significant proportion of research "indicates some relationship between pornography and antisocial conduct for those who, on account of other factors, would be so disposed in any account").

II.

First amendment analysis is an exercise in line-drawing between the legitimate interests of society to regulate itself and the paramount necessity of encouraging the robust and uninhibited flow of debate which is the lifeblood of government by the people. That some of the lines are blurred or irregular does not, however, prove the majority's proposition that it would be hopelessly complicated to delineate between protected and unprotected speech in this case. Such a formulation in fact begs the critical question in two ways. First, a hierarchy of first amendment speech classifications has in fact developed largely in the last few years,[10] and there is no reason to assume the hierarchy is ineluctable. Second, the essence of the judicial function is to judge. If it is impossible to judge, there is no reason for judges to pretend to perform their role, and it is a nonsequitur for them to conclude that society's or a state's judgment is "wrong." Hence, in novel cases like this one, the reasons for protecting speech under the first amendment must be closely examined to properly evaluate Hustler's claim to unlimited constitutional protection.

The Supreme Court recently engaged in the balancing appropriate to a novel first amendment case in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985).[11] The Court concluded that the victim of a negligently erroneous

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10. *See generally* G. Gunther, *Cases & Materials on Constitutional Law*, chs. 12, 13 (10th ed. 1980).

11. The holding in *Dun & Bradstreet* specifically states that the credit reports there involved did not constitute "commercial speech" as that term is understood for first amendment purposes. 472 U.S. at 762 n. 8, 105 S. Ct. at 2947 n. 8.

credit report might recover presumed and punitive damages from the publisher, in the absence of actual damages. In so doing, it evaluated the interest sought to be protected by the state against the level of first amendment interest embodied in the communication at issue.

The state's "strong and legitimate" interest in protecting one's reputation was at issue in *Gertz v. Robert Welch, Inc.*: "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, *like the protection of life itself,* is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' " 418 U.S. at 341, 94 S. Ct. at 3008 (quoting *Rosenblatt v. Baer,* 383 U.S. 75, 92, 86 S. Ct. 669, 679, 15 L.Ed.2d 597 (1966) (Stewart, J., concurring)) (emphasis added). *See also Dun & Bradstreet,* 472 U.S. at 757-58, 105 S. Ct. at 2945 (also quoting Justice Stewart's *Rosenblatt* statement). The interest in protecting life is recognized specifically for first amendment purposes and, analytically, can be no less important than the interest in reputation. The state's interest in this case is to protect the lives of adolescents who might be encouraged by pornographic publications and specifically instructed how to attempt life-threatening activities. In *NAACP v. Claiborne Hardware Company,* 458 U.S. 886, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982), the Supreme Court assumed that if violence had broken out as a result of Charles Evers' incendiary speech, both the mob and the speaker could have been subjected to damage claims by the victims. For similar reasons, "fighting words" have long been outside the sphere of first amendment protec-

tion. *See Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942). The Supreme Court has also dealt favorably with state regulations designed to protect minors from performing sexual acts by prohibiting distribution of films containing such acts. *New York v. Ferber,* 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982). There the Court found it "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological wellbeing of a minor' is 'compelling'." 458 U.S. at 756-57, 102 S. Ct. at 3354, (quoting *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607, 102 S. Ct. 2613, 2620, 73 L.Ed.2d 248 (1982)). The Court has even gone so far as to uphold an FCC regulation banning "indecent" speech from the airwaves at the times when children would be in the audience. *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978). States already regulate the distribution of pornography to minors, *see* Schauer, *supra* n. 9, at 196-97, and a remedy for the collateral consequences of unauthorized distribution, by way of a civil action for damages, would only serve to reinforce that regulation.

Permitting recovery of damages in defamation cases offers an analogous framework. Balanced against the state interest, the Court held in *Dun & Bradstreet* that the first amendment interest at stake was less important than the one weighed in *Gertz,* 472 U.S. at 758, 105 S. Ct. at 2945. While *Gertz* involved a libelous publication on a matter of public concern, the false information in *Dun & Bradstreet* was contained in a credit report distributed to merchants. The Court employed the test of content, form and context, best articulated in *Connick v. Myers,* 461 U.S. 138, 148-49, 103 S. Ct. 1684, 1690,

75 L.Ed.2d 708 (1983), to analyze whether the credit report was a matter of "public concern." Speech on matters of "private concern," the Court found, while not wholly unprotected, is not as substantial relative to important state interests. Thus, the credit report was prepared solely for the individual interest of the speaker and a specific business, it was false and clearly damaging, and, like advertising, it represents a form of speech unlikely to be deterred by incidental state regulation: The credit report involved a matter of "private concern."

Measured by this standard, both *Hustler* in general and "Orgasm of Death" in particular deserve limited only first amendment protection. *Hustler* is a profitable commercial enterprise trading on its prurient appeal to a small portion of the population. It deliberately borders on technical obscenity, which would be wholly unprotected, to achieve its purposes, and its appeal is not based on cognitive or intellectual appreciation.[12] Because of the solely commercial and pandering nature of the magazine, neither *Hustler* nor any other pornographic publication is likely to be deterred by incidental state regulation. No sensitive first amendment genius is required to see that, as the Court concluded in *Dun & Bradstreet,* "[t]here is simply no credible argument that this type of [speech] requires special protection to insure that 'debate on public issues [will] be uninhibited, robust, and wide-open.' " 472 U.S. at 762, 105 S. Ct. at 2947, (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L.Ed.2d 686 (1967)).

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12. In *FCC v. Pacifica Foundation,* the Court's opinion states that patently offensive references to excretory and sexual organs and activities, while to some extent protected, "surely lie at the periphery of First Amendment concern." 438 U.S. at 743, 98 S. Ct. at 3037.

To place *Hustler* effectively on a par with *Dun & Bradstreet's* "private speech" or with commercial speech,[13] for purposes of permitting tort lawsuits against it hardly portends the end of participatory democracy, as some might contend. First, any given issue of Hustler may be found legally obscene and therefore entitled to no first amendment protection. Second, tort liability would result after-the-fact, not as a prior restraint, and would be based on harm directly caused by the publication in issue. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. at 917-919, 102 S. Ct. at 3427-28. Third, to the extent any chilling effect existed from the exposure to tort liability, this would, in my view, protect society from loss of life and limb, a legitimate, indeed compelling, state interest. Fourth, obscenity has been widely regulated by prior restraints for over a century. Before *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957), there was no *Hustler* magazine and it would probably have been banned. Despite such regulation, it does not appear that the pre-*Roth* era was a political dark age. Conversely, increasing leniency on pornography in the past three decades has allowed pornography to flourish, but it does not seem to have corresponded with an increased quality of debate on "public" issues. These observations imply that pornography bears little connection to the core values of the first amendment and that political democracy has endured previously in the face of "majoritarian notions of social propriety."

Rendering accountable the more vicious excesses of

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13. *Compare Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980).

pornography[14] by allowing damage recovery for tort victims imposes on its purveyors a responsibility which is insurable, much like a manufacturer's responsibility to warn against careless use of its products. A tort remedy which compensates death or abuse of youthful victims clearly caused by a specific pornographic publication would be unlikely to "chill" the pornography industry any more than unfavorable zoning ordinances[15] or the threat of obscenity prosecution[16] has done. The reasonableness of allowing a tort remedy in cases like this is reinforced by the fact that only one lawsuit was filed in regard to "Orgasm of Death." The analogy with regulations on commercial speech is not inappropriate: pornography should assume a lower value on the scale of constitutional protection; and the state regulation by means of tort recovery for injury directly caused by pornography is appropriate when tailored to specific harm and not broader than necessary to accomplish its purpose. *See Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351.

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14. See, for example, the Meese Commission Report, whose research samples included 2,325 magazine titles, 725 book titles, and 2,370 film titles. *Commission Report, supra* n. 9, Vol. II at 1504. While more graphic titles are cited, the following is a list of the more shocking pornograpic publication titles: *Animal Action, Incest Mommy,, Island of Incest, I Want All Night Abuse, Knocked up Black Mama, Nazi Sex Slave, Nympho Mother's Incest Obsession, Pregnant Dildo Bondage, Pregnant Lesbians, Slave Exchange, Teenage Tramp, Transvestites Getting Together, Teen Rape Orgy, The Nuns Animal Fun, Unwilling Sex Slave.*

15. *City of Renton v. Playtime Theatres, Inc.*, ____U.S.____, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986).

16. The production, distribution, and retail sale of pornographic materials has become a multi-billion dollar industry in the United States. *See Commission Report, supra* n. 9, Vol. II, ch. 8. Current laws and their enforcement apparently have little deterrent effect on this blossoming industry. *Id.*, Vol. I at 366-72.

The foregoing analysis immediately differentiates this case from *Brandenburg v. Ohio,*[17] which addressed prior restraints on public advocacy of controversial political ideas. Placing *Hustler* on the same analytical plane with *Brandenburg* represents an unwarranted extension of that holding, which, unlike *Dun & Bradstreet* and the commercial speech cases, rests in the core values protected by the first amendment. Even *Brandenburg,* however, recognized that the state's regulatory interest legitimately extends to protecting the lives of its citizens from violence induced by speech. Moreover, *Brandenburg* is intertwined with the context of the speech as well as its content—advocacy of inciteful ideas would thus be differently regarded in a collection of speeches by Tom Paine than it is among a crowd of armed vigilantes who proceed to riot. The *Brandenburg* test, implicitly rejected by the majority, is simply inappropriate to define the limits of constitutional protection afforded in this case.[18] Viewed in the overall context of first amendment jurisprudence, moreover, *Brandenburg* does not exclude the possibility of state regulation.

III.

Texas courts have never been called upon to assess a claim like this one. Since there is no cross-appeal, we should not speculate on the precise nature of the theory

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17. 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969).

18. *Compare* Comment, "Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations," 93 Yale L.J. 744 (1984) (advocating liability on a negligence standard defined by reference to *Brandenburg*); with Comment, "Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis," 52 S. Cal. L. Rev. 529 (1979) (similar standard to Yale Law Journal).

of liability a Texas court might accept, although negligence and attractive nuisance seem theoretically appropriate.[19] Texas law supplies no reason to conclude, as the district court did, that *Brandenburg v. Ohio,* representing a federal constitutional limitation on a state's restraints on speech, could be turned into an affirmative theory of tort law. I believe this use of *Brandenburg* is wrong, insofar as it suggests that federal constitutional law rather than state law governs the first issue in this case, which is the nature of the tort committed by Hustler.

Eliminating the *Brandenburg* incitement theory as a basis for recovery would have been sufficient to reverse the jury award here. The majority go much further, however, and afford *Hustler* virtually complete protection from tort liability under the first amendment. I vigorously oppose their unnecessary elaboration on first amendment law, which, I believe, will undercut the ability of the states to protect their youth against a reckless and sometimes dangerous business which masquerades as a beneficiary of the first amendment.

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19. In *Wierum v. RKO,* 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975), the Supreme Court of California held a radio station liable for broadcasting a promotional event which caused the teenage listeners to participate in a high-speed chase in the Los Angeles freeways killing a motorist. There was a direct connection between the station's broadcast and the fatal accident. In *Hyde v. Missouri,* 637 S.W.2d 251 (Mo. Ct. App. 1982) the court held a newspaper and other defendants liable for publishing the name of a victim of a sexual assault while her attacker was still at large. The causal connection between the published information and the attacker's continued threats to the victim was again straightforward. Other courts have rejected damage claims based on tenuous facts. *Zamora v. Columbia Broadcasting System,* 480 F.Supp. 199 (S.D. Fla. 1979), or first amendment analysis with which I differ. *DeFilippo v. National Broadcasting Co.,* 446 A.2d 1036 (R.I. 1982); *Olivia N. v. National Broadcasting Co.,* 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981).

APPENDIX B-1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-82-198

DIANE HERCEG and ANDY VINES,
Plaintiffs,

v.

HUSTLER MAGAZINE, INC.,
Defendant.

(Filed March 29, 1985)

MEMORANDUM AND ORDER

Presently pending before the Court is Defendant's Motion for Summary Judgment. Rule 56, FED. R. CIV. P. The Court, having considered carefully the motion, together with the briefs filed by the parties and the relevant case law, concludes that the motion should be granted in part.

This action was originally filed on January 22, 1982. alleging negligent publication and strict liability as theories of recovery. On June 6, 1983, the Court (per Judge McDonald) dismissed Plaintiffs' causes of action for failure to state a claim upon which relief could be granted. Rule 12(b)(6), FED. R. CIV. P. *See Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802 (S.D. Tex. 1983). In that memorandum opinion and order, Judge McDonald granted "leave to amend and to add an allegation of

incitement." *Id.* at 805. Plaintiffs filed their Amended Original Complaint on June 15, 1983. On June 29, 1983, Defendant filed its Motion to Dismiss or, In the Alternative, to Strike Claims. That motion was denied on May 1, 1984. *Herceg v. Hustler Magazine, Inc.*, 583 F.Supp. 1566 (S.D. Tex. 1984). The instant motion was filed on September 10, 1984.

NEGLIGENCE & STRICT LIABILITY

Initially, the Court will turn its attention to Plaintiffs' negligence and strict liability theories. While Defendant has characterized this motion as one for summary judgment, the Court finds it analogous to one for dismissal for failure to state a claim. Inasmuch as the Court's decision in regard to these theories is reached without recourse to matters outside the pleadings, the motion will be treated as one to dismiss. *Moffett v. Commerce Trust Co.*, 187 F.2d 242 (8th Cir.), *cert. denied*, 342 U.S. 818, *reh. denied*, 342 U.S. 879 (1951), *reh. denied*, 343 U.S. 989 (1952).

As a threshold matter, the Court notes that the negligence and strict liability theories presented in the Amended Complaint are identical to those issues as presented in the Original Complaint. As noted previously, Judge McDonald dismissed both theories for failure to state a claim. 565 F.Supp. 802. Plaintiffs have made no attempt to amend these issues to overcome their defects. Accordingly, dismissal would be warranted without further consideration. However, in an abundance of caution, the Court will address briefly the merits of each claim.

The Court has been unable to discover any case which has held that a published article may constitute an

unreasonably dangerous product as that term is defined in § 402A of the Second Restatement of Torts. *See* Comment i to § 402A. Further, the Court is completely unaware of any action in which a court has held the written word may constitute an attractive nuisance. On the contrary, in those cases where the issue has been addressed, either directly or in analogous actions, courts have consistently rejected the concept of strict liability in regard to the content of published material. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Two Rivers Co. v. Curtis Breeding Serv.*, 624 F.2d 1242 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. Civ. App.—Houston, 14th Dist. 1974). Treatises on the subject are in accord. *See e.g.* Prosser, *Law of Torts* § 78 at 510-516 (4th Ed. 1971). In light of the foregoing, the Court concludes that imposition of liability without fault would be in direct contravention of the constitutional limitation announced in *Gertz*. *See also Time v. Firestone*, 424 U.S. 448, 459 (1976).

The concept of negligent publication is one which arose in defamation cases, clearly not at issue here. Beyond defamation, no court has ever imposed liability on a private publisher under the theory of negligence.[1] Indeed, the Court is unable to conceive of a set of facts which would give rise to a duty on the part of the publisher. But of primary concern to the Court is the extent to which civil liability under traditional negligence

1. The only instances in which the courts have upheld a cause of action in negligent publication lie where the United States was defendant. These cases have repeatedly stressed the "public function" of the publications. No one suggests here that Hustler has been appointed to fulfill any public function. Cf. *Debardeleben Marine Corp. v. United States*, 451 F.2d 140 (1971).

theories would contravene the first amendment protection afforded free speech. The commercial nature of the speech at issue here does not relax the Court's vigilance. *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 n.23 (1978). Neither does the issue of civil versus criminal liability. As the Supreme Court noted more than twenty years ago, "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of [criminal] prosecution. . . ." *New York Times Co. v. Sullivan,* 376 U.S. 254, 277 (1964). The first amendment protections remain even where, as Plaintiffs have urged, the material may be accessible to minors. *Cf. F.C.C. v. Pacifica Foundation,* 438 U.S. 726 (1978); *Butler v. Michigan,* 352 U.S. 380 (1957).

In a recent case, remarkedly similar to facts here, a 13-year old child accidentally hung himself while attempting to duplicate a stunt shown on N.B.C.'s "Tonight Show." The Supreme Court of Rhode Island rejected liability in negligence, holding that to allow recovery would "invariably lead to self-censorship by broadcasters in order to remove any matter that may be emulated and lead to a law suit." *DeFilippo v. National Broadcasting Co., Inc.,* 446 A.2d 1036, 1041 (1982). The result in this case is in accord with those from other jurisdictions which have addressed the issue. *See e.g. Zamora v. Columbia Broadcasting System,* 480 F. Supp. 199 (S.D. Fla. 1979); *Bill v. Sup. Ct. for City and County of San Francisco,* 187 Cal.Rptr. 625 (1982), *reh. denied* (1983); *Olivia v. National Broadcasting Co., Inc.,* 178 Cal.Rptr. 888 (1981), *cert. denied,* 458 U.S. 1108, *reh. denied,* 458 U.S. 1132 (1982). The Court concludes that there is therefore no basis in law or at

equity in support of a negligence cause of action against Defendant herein.

INCITEMENT

> [T]he summary judgment standard . . . is a strict one, allowing entry of judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact *and* that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c), *see, e.g. Transourse International v. Trinity Industries, Inc.*, 725 F.2d 274, 279 (5th Cir. 1984). Moreover, in considering a motion for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party. *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 440 (5th Cir. 1982). However, once the moving party makes an initial showing that no genuine issue of material fact exists, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56 (e).

Shelton v. City of College Station, Slip Op. 83-2765 at 2990-91 (5th Cir. March 11, 1985), *quoting Hood v. Tenneco Texas Life Insurance Co.*, 739 F.2d 1012, 1014 (5th Cir. 1984) (emphasis added).

Resolution of this motion has been particularly troubling for the Court. Plaintiffs' Amended Original Complaint seems to suggest that Defendant negligently published the article in question, and that this negligent publication in turn incited decedent's actions. Standing alone, these averments clearly do not satisfy the test for incitment as announced in *Brandenburg v. Ohio*,

395 U.S. 444 (1969), and would ordinarily entitle Defendant to judgment as a matter of law. *Cf. Olivia,* 178 Cal.Rptr. 888. However, in order for Defendant to prevail on its motion, it must prove that no issue of material fact exists as to the three factual issues comprising incitement. *Herceg,* 583 F.Supp. 1566, 1567 n. 1. After an exhaustive review of the pleadings and attachments as a whole, and mindful of the Fifth Circuit's stricture that the record must be viewed in a light most favorable to the nonmovant, *Dernick v. Bralorne Resources, Ltd.,* 639 F.2d 196 (5th Cir. 1981), the Court concludes that a full hearing on the issue of incitement would be in the interests of justice and judicial economy.

Accordingly, for the reasons stated above, the Court hereby ORDERS:

Defendant's Motion for Summary Judgment is GRANTED IN PART. All allegations in the Amended Original Complaint regarding liability under any theory other than incitement are DISMISSED. This case will be set for a full hearing on the incitement issue alone at the convenience of the Court and the parties.

The Clerk shall file this Memorandum and Order and provide all parties with a true copy.

DONE at Houston, Texas, this 29th day of March 1985.

/s/ WOODROW SEALS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-82-198

DIANE HERCEG and ANDY VINES,
Plaintiffs,

v.

HUSTLER MAGAZINE, INC.,
Defendant.

(Filed March 29, 1985)

ORDER

Presently pending before the Court is Plaintiffs' Motion to designate Bob Rogers as an expert witness for purposes of a summary judgment hearing, and for the Court to consider certain pictures as part of Plaintiffs' briefs in regard to the Motion for Summary Judgment decided this day.

The Court, having considered the motion, hereby ORDERS:

Plaintiffs' motion to offer Bob Rogers as an expert witness for the purposes of a summary judgment hearing is GRANTED.

The photographs at issue here are not relevant to the issues of summary judgment. Plaintiffs may offer said photographs at trial, subject of course to a determination of relevancy, and a weighing of their prejudicial value. Rules 401 & 403, FED. R. EVID. Pending resolution of

those issues, the Court hereby directs the Clerk to place under seal the photographs appended to Plaintiffs' Further Response to Defendant's Motion for Summary Judgment.

The Clerk shall file this Order and provide all parties with a true copy.

Done at Houston, Texas, this 29th day of March 1985.

/s/ WOODROW SEALS
United States District Judge

APPENDIX B-2

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-82-198

DIANE HERCEG and ANDY VINES

v.

HUSTLER MAGAZINE, INC.

(Filed November 25, 1985)

MEMORANDUM AND ORDER

Presently pending before the Court is Defendant Hustler Magazine's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, For a New Trial. Rules 50(b) and 59, FED. R. CIV. P. The Court, having considered carefully the motion, together with the briefs submitted by the parties, the evidence adduced at trial and the relevant law, concludes that the motion must be denied.

JUDGMENT N.O.V.

The standard governing a decision to grant or deny a motion for judgment notwithstanding the verdict is that set forth in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc):

> On motions for . . . judgment notwithstanding the verdict the Court should consider all of the

> evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the [motion] is proper . . . However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine credibility of witnesses.

411 F.2d at 374. *See also, Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1563 (5th Cir. 1984).

The arguments which counsel for Hustler advances here are those which the Court considered and rejected at the time of Defendant's motion for a directed verdict, both at the close of Plaintiffs' case in chief, and at the close of all testimony. In every instance cited by Hustler, more than a mere scintilla of evidence exists. The jury was entitled to weigh and evaluate the opposing testimony, and this Court will not now invade the traditional province of the fact finder by substituting its judgment.

NEW TRIAL

The decision to grant or deny a motion for a new trial is one committed to the sound discretion of the court. *Reeves v. General Foods Corp.,* 682 F.2d 515 (5th Cir. 1982). The standard here is lower than that applicable under a motion for Judgment n.o.v. The trial judge may set aside the verdict and grant a new trial if, in his opinion, the verdict is against the great weight of the evidence or will result in a miscarriage of justice,

even though there may be substantial evidence in support. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927 (5th Cir. 1982). Moreover, the court is not required to view all the evidence and make all inferences in a light favorable to the non-mover, but may weigh and evaluate the evidence in much the same fashion as the jury. This Court will not order a new trial, however, merely because it may have reached a different verdict. The verdict must be against the *great* weight of the evidence. *See generally*, 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2806 (1973).

Hustler's motion for a new trial attacks the sufficiency of evidence covering several issues presented at trial. The Court notes that these arguments are the same rejected at the close of testimony and outside the presence of the jury. The issues presented, and their evidentiary support, were ably contested by counsel for both sides. And while conflicting evidence was introduced covering virtually every issue, the Court is unable to conclude that the jury's verdict was against the great weight of that evidence.

Counsel for Hustler also urges that Plaintiffs' closing argument (asserting greed and avarice on the part of Hustler Magazine) were outside the record and so prejudicial and inflammatory that it could not be cured by objection and cautionary instructions. The Court disagrees. Taken as a whole, the arguments of counsel and charge to the jury were sufficient to safeguard Defendant from any possible prejudice resulting from Plaintiffs' argument.

Accordingly, for the reasons stated above, the Court hereby ORDERS:

Plaintiffs' Motion for Judgment Notwithstanding the Verdict or, in the Alternative; For a New Trial is DENIED.

The Clerk shall file this Memorandum and Order and provide all parties with a true copy.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 25th day of November 1985.

/s/ WOODROW SEALS
United States District Judge